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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1062

EDMUND ROSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, p. 11a) is reported at 485 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1973 (Pet. App. B). A petition for rehearing with a suggestion for rehearing *en*

banc was denied on November 9, 1973 (Pet. App. C). On December 3, 1973, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including January 7, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established entrapment as a matter of law, or, alternatively, whether the court properly denied certain requested instructions on entrapment.

2. Whether the district court should have granted petitioner's motion for a new trial based on the alleged participation in discussions of defense matters between petitioner and his counsel by co-defendants who later, after pleading guilty, provided the government with information about the case, where the district court found that no matters learned at defense discussions were divulged to the government.

3. Whether petitioner was deprived of his right to effective cross-examination when the court refused to give him access to internal police files relating to the government's chief witness, where the court examined the files *in camera* and determined that there were no matters in them appropriate for disclosure.

STATEMENT

An eight-count indictment returned in the United States District Court for the Southern District of

New York charged petitioner and two co-defendants, Nicholas DeStefano and Nicholas Lamattina, with obstruction of justice (Count 2), in violation of 18 U.S.C. 1505 and 2; bribery of a public official (Counts 4 through 8), in violation of 18 U.S.C. 201 (b) and 2; removal of public documents (Count 3), in violation of 18 U.S.C. 2071;[1] and conspiracy to commit those crimes (Count 1), in violation of 18 U.S.C. 371. Lamattina pleaded guilty to conspiracy and one count of bribery, and DeStefano pleaded guilty to all counts.[2] After a jury trial, petitioner was convicted of obstruction of justice (Count 2), three counts of bribery (Counts 6 through 8), and conspiracy (Count 1). Petitioner was sentenced to five years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed the conviction, but vacated the sentence and remanded for resentencing in conformity with its opinion (Pet. App. B).[3] Petitioner has not yet been resentenced.

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[1] This count was dismissed by the court prior to trial on the ground that the acts charged in the indictment did not constitute the offense defined by the statute. *United States* v. *Rosner*, 352 F. Supp. 915 (Pet. App. E, pp. 55a-62a).

[2] Lamattina and DeStefano have each been sentenced to imprisonment for a year and a day, the former on February 19, 1974, and the latter on February 20, 1974.

[3] The case was remanded for sentencing by a different district judge because the original sentence had been based in part upon a prosecutor's report charging petitioner with seventeen alleged incidents of corruption, which defense counsel had not been given an opportunity to attempt to refute (Pet. App. B, pp. 40a-45a).

The facts are detailed in the opinion of the court of appeals (Pet. App. B, pp. 13a-20a), and we will summarize them here.

1. Background

In February 1971, almost eight months prior to any of the transactions which formed the basis of this case, Detective Robert Leuci of the New York City Police Department agreed to assist federal and state authorities in conducting investigations into the criminal justice system in the city of New York (T. 165).[4] In March 1971, Detective Leuci agreed to hold himself out as a corrupt policeman ready to assist anyone who wanted his services (T. 166). In August 1971, a federal grand jury was investigating the dismissal of a state narcotics case against one Felix Martinez, in an effort to determine whether the case was dismissed as a result of bribery. Targets in the investigation included the arresting officers and Dominick Marcone, a bail bondsman (T. 112-115). Detective Leuci was asked by the United States Attorney's Office to investigate the Marcone matter in an undercover capacity (T. 116).[5] Consequently, on September 28, 1971, Detective Leuci established contact with Nicholas Lamattina, also a city police detective and later a co-defendant in the instant case (T. 226-227). Detective Leuci told Lamattina that

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[4] "T." refers to the transcript of the trial.

[5] There is no evidence that petitioner was involved in the Marcone matter.

he had a contact in the United States Attorney's Office who was active in the Marcone investigation and who could possibly help Lamattina and his friends (T. 170-171).

Lamattina and Detective Leuci met on September 30, 1971, and Lamattina implicated Nicholas DeStefano, a private investigator and also an eventual co-defendant in the instant case, in the Marcone matter (T. 175-177).[6] Lamattina had arranged on his own for Detective Leuci to meet with DeStefano and Marcone later that day (T. 177); after their discussion, they went to a restaurant to meet them (T. 181, 184-185). Following discussion of the Marcone case (T. 182-187), Detective Leuci overheard DeStefano say to Lamattina that the "Rosner thing is important to me, too" (T. 188). After some additional discussion about the Marcone case (T. 188-191), DeStefano said to Detective Leuci, "You know, you can help me with something else, something else I am interested in" (T. 191). Leuci replied that he knew DeStefano meant "the Rosner situation" (T.

[6] Six of the meetings (those held on September 30 and October 12, 13, 15, 18, and 19, 1971) were tape recorded by means of electronic equipment worn by Detective Leuci. Transcripts were available to defense counsel and portions were played for the jury. Because petitioner, Lamattina, and DeStefano were sometimes suspicious and searched Detective Leuci (see, *e.g.*, T. 197, 208, 224), he did not take the risk of wearing the equipment at all of the meetings, and consequently not all of the meetings were recorded.

191).[7] DeStefano then asked Leuci to approach his contact about the matter immediately, because he wanted to know "how tight the case [was]" (T. 191-192). A meeting was arranged for the next day, October 1, 1971 (T. 192-193, 195); however, when DeStefano told Leuci he wanted to bring Rosner along, Leuci said he did not like the idea of having Rosner at the meeting (T. 193-194). Detective Leuci was not investigating Rosner at this time (T. 454-455, 1208).

Petitioner did not attend the meeting on October 1, 1971. DeStefano told Detective Leuci that the reason was that petitioner felt "he had the case beat" but that petitioner would be in touch if the need ever arose. Leuci did not press to meet petitioner (T. 200). At this meeting only the Marcone case was discussed (T. 198-200).

2. Facts of this Case

On October 4, 1971, Detective Leuci met with DeStefano, Lamattina, and petitioner. After some discussion of the Marcone case, petitioner asked De-

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[7] The "Rosner situation" was a case, *United States* v. *DiStefano* (sic), *Rosner, et al.*, 464 F. 2d 845 (C.A. 2), in which Rosner and DeStefano had been indicted on charges of suborning perjury and procuring false alibi testimony from one Pedro Hernandez and others at a federal narcotics trial held in March 1967. This indictment was ultimately dismissed for failure of the government to prosecute due to the disappearance of its chief witness, Pedro Hernandez, who turned up in Mexico after the statute of limitations had run. The case will be referred to as "*Rosner I*," following the form of the court of appeals; petitioner refers to the case as "*Hernandez*."

tective Leuci, "Can your friend help us in our case [*Rosner I*]" (T. 213). After Detective Leuci indicated that he probably could help, petitioner stated, "Well I would like your friend to get me 3500 material" (*ibid.*).[8] Petitioner also stated, in reference to witnesses in the *Rosner I* case, "It is my understanding that two are good and two are bad, and I would like to find out what two are good and what two aren't good, and if, in fact, do they have all four witnesses" (T. 214). After a discussion of payment for Detective Leuci's contact (T. 214-215), petitioner gave DeStefano some money, and DeStefano passed $400 to Leuci (T. 216, 219; Count 4). DeStefano told Leuci privately that he should get petitioner in deeper since he had the money (T. 218), but Detective Leuci never followed this suggestion (T. 632-633). Petitioner then told Detective Leuci that if his contact were able to acquire the documents requested, "there will be a lot more for him in the future" (T. 219).

On October 6, 1971, Detective Leuci met with DeStefano and Lamattina and agreed on a fee for Leuci and his contact (T. 230, 235). DeStefano asked Leuci to get a copy of the proposed indictment in Marcone and information on *Rosner I* (T. 231-232). Petitioner did not attend this meeting.

On October 8, 1971, Detective Leuci met with DeStefano and Lamattina. When Leuci told DeStefano that he had the 3500 material, DeStefano telephoned

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[8] "3500 material" refers to statements of witnesses in the *Rosner I* case.

petitioner (T. 236-237) and then gave Detective Leuci $100 for a night out for Leuci and his contact (T. 237; Count 5). When petitioner arrived he was given the Marcone indictment, which he returned to Detective Leuci, and the 3500 material, which he studied (T. 248-250, 269-270). Petitioner told Detective Leuci that he would be paid $2500 (T. 270). Petitioner and DeStefano asked Detective Leuci other questions pertaining to the *Rosner I* case, especially about a list of witnesses (T. 271-272). As the meeting broke up, petitioner took the Marcone indictment with him to study over the weekend (T. 274).

On October 12, 1971, Detectice Leuci met with DeStefano. During the conversation DeStefano asked Leuci for the grand jury minutes in *Rosner I*, and, after some discussion, Leuci agreed to try to obtain them (T. 285-287). DeStefano then gave Detective Leuci $1150 for services already rendered, stating that the money came from petitioner (T. 288-289, 292; Count 6).

On October 13, 1971, Detective Leuci met with DeStefano and petitioner. Before petitioner arrived, DeStefano asked Leuci if he would find out whether an individual named George Stewart was an informant or not. Leuci agreed to do so (T. 296-298).[*]

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[*] Petitioner had been counsel for Stewart and one of his co-conspirators in a narcotics case, but Stewart testified against the others before the grand jury (T. 645-646, 647). An indictment had been filed against these co-consiprators on October 13, 1971 (G. Ex. 23), but at that time Stewart had been relocated out of New York State by the federal govern-

After the conversation about Stewart, petitioner appeared and there was a discussion about the *Rosner I* case and the grand jury minutes, for which petitioner agreed to pay $1500 (T. 301-302). Leuci saw petitioner hand DeStefano a sum of money, and thereafter DeStefano gave Leuci $850 (T. 306-308; Count 7). Out of petitioner's presence, DeStefano told Leuci that he could not guarantee that Stewart would not be killed if Leuci discovered Stewart's whereabouts (T. 309-310).

On October 15, 1971, Detective Leuci met with petitioner and DeStefano. Leuci reported that he would have the grand jury minutes in a few days. Petitioner asked Leuci questions about the availability of witnesses in the *Rosner I* case (T. 312-313). At one point he asked Leuci to get him the arrest and conviction record of one of the witnesses (T. 313-314). DeStefano reminded petitioner that the Stewart matter had been discussed with Leuci (T. 314). Leuci stated that he had not been able to find out anything (*ibid.*). Petitioner asked Leuci to try again and gave Leuci some background information on Stewart (T. 314-317).

On October 18, 1971, Detective Leuci met with DeStefano and Lamattina and gave them the grand jury testimony in *Rosner I* (T. 319-322).

On October 19, 1971, Detective Leuci met with DeStefano and petitioner. Leuci saw petitioner hand DeStefano something, and, after petitioner left, De-

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ment, and only a handful of people in the government knew his whereabouts (T. 652-653).

Stefano gave Detective Leuci $350 (T. 330-331; Count 8).

In his trial testimony, petitioner acknowledged that he paid DeStefano money intended for Detective Leuci and his contact (T. 881, 910). He admitted receiving the 3500 material and the grand jury testimony (T. 868-876, 911) but claimed that, although at first he declined DeStefano's invitation to meet with Detective Leuci (T. 820-821), he later went along, having been entrapped into doing so by the pressures placed upon him by DeStefano and Lamattina (T. 842, 866-867).[10] He further claimed that he never took the Marcone indictment and that he only intended to obtain information about Stewart out of curiosity (T. 874, 876, 1119).

ARGUMENT

1. Petitioner's contention (Pet. 30-34) that the evidence established entrapment as a matter of law, or, in the alternative, that the trial court refused a proper instruction on entrapment is answered in the opinion of the court of appeals, upon which we rely (Pet. App. B, pp. 23a-29a).[11]

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[10] Petitioner testified that DeStefano continually implored him to become involved. He also testified that DeStefano pressured him with false information, including a possible indictment for murder (T. 834-835, 838-839). Petitioner recites these self-serving allegations as facts (Pet. 4-5).

[11] Petitioner contends that the jury verdict of acquittal on the first two counts of bribery, namely $400 paid on October 4th and $100 paid on October 8th, was based on the jury's belief that petitioner had been entrapped on those occasions

2. Petitioner urges (Pet. 17-29) that the trial court erred in denying his motion for a new trial based on the alleged participation in petitioner's meetings with counsel by petitioner's co-defendants, who later, after pleading guilty, provided the government with information about the case, despite the fact that the court found that no matters learned at defense discussions were divulged to government attorneys.

a. The facts relevant to this issue are set forth in the opinion of the district court denying the motion for a new trial [12] (Pet. App. A, pp. 2a-5a) and in the opinion of the court of appeals (Pet. App. B, pp. 20a-23a, 30a-32a). Briefly, on December 20, 1971, some two months after the transactions for which petitioner had been convicted, Detective Leuci met

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and that therefore the jury would have acquitted him on all counts had the court given the requested instruction (Pet. 33-34). Although the issue of instructions is fully answered in the opinion of the court of appeals, we deem it appropriate to comment further on this claim. While one should not speculate on the rationale of the jury in reaching its verdict, there are reasonable explanations which may have caused the acquittals. The second payment was made to Leuci for a night out on the town, and the jury may have believed that, as a gratuity, it was not attributable to petitioner. The first payment was made before petitioner received any documents, and the jury may have believed that this preliminary payment was adequately covered by the conspiracy count, in which it was listed as one of the overt acts.

[12] This was petitioner's second motion for a new trial. The first was based on newly discovered evidence of Detective Leuci's alleged corrupt activities and was denied by the court on January 26, 1973.

with DeStefano and Lamattina to discuss a matter unrelated to Rosner. During this meeting, they accidentally discovered that Detective Leuci was a government agent. They were immediately taken to the United States Attorney's office where they were informed of the general nature of the evidence against them, and were asked to cooperate with the government. They asked for time to consider the proposal and agreed not to reveal Detective Leuci's activities.[13] From the outset, both DeStefano and Lamattina steadfastly refused to consider involving petitioner in any way (Pet. App. A, p. 2a).[14]

Between December 20, 1971, and July 5, 1972, when the instant indictment was returned, the gov-

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[13] Detective Leuci was involved in a number of investigations of corruption in the New York criminal justice system which were in no way related to petitioner (T. 115-116), and disclosure of his cover would have aborted the investigations then in progress, as happened on June 15, 1972, when New York newspapers published articles outlining Leuci's undercover activities.

[14] Petitioner's contention that once DeStefano and Lamattina had been asked to consider cooperating with the government they became government agents and as such should have been instructed not to attend defense meetings with petitioner is untenable. Such a rule would deprive individuals so solicited by the government of the right adequately to prepare for their own defense through cooperation with their co-defendants, and would surely give rise to Sixth Amendment claims by such individuals. At the time of the government's offer to DeStefano and Lamattina, there was absolutely no expectation that they would plead guilty (Motion T. 67-68, 70-71) ("Motion T." refers to the transcript of the second motion for a new trial).

ernment attorneys met with DeStefano and Lamattina frequently. Most of the meetings were devoted to efforts by the prosecutors to induce them to cooperate with various investigations into corruption in the criminal justice system of New York City. Both generally resisted these efforts, and the prosecutors testified that they obtained little useful information from these conversations. DeStefano did aid the government on one occasion and Lamattina on two occasions; none of this cooperation in any way related to petitioner. Although the government attempted to elicit information from the two men concerning the instant case, neither indicated the slightest willingness to cooperate (Motion T. 118-119, 133-134, 146).

After the return of the indictment against petitioner, DeStefano, and Lamattina, neither DeStefano nor Lamattina met with any government representative until early in November 1972, when DeStefano met with the government lawyers, who again urged him to cooperate. DeStefano persisted in his unwillingness to discuss any aspect of the Rosner case, in which he considered himself a defendant.

On November 16, 1972, four days before the trial began, government attorneys met with DeStefano and Lamattina. They were instructed that the government lawyers would not discuss any of the facts of the trial or any possible defense that they or Rosner might have to the charges, and Lamattina signed a form indicating that he had been so instructed (Defendant's Exhibit C; Motion T. 411-412). DeStefano

refused to sign a similar form, and he was not questioned on that date (Motion T. 139, 141); however he did sign the form at the next meeting, on November 18, 1972 (Defendant's Exhibit A, B; Motion T. 142; Pet. App. B, p. 32a, n. 17).

On November 18, 1972, Lamattina agreed to plead guilty and cooperate with the government; he pleaded guilty on November 20, 1972, before the trial began. DeStefano remained steadfast in his refusal to cooperate until he pleaded guilty on November 21, 1972, after the jury had been selected. DeStefano pleaded guilty to all charges in the indictment; this plea was not the result of any agreement with the government (Motion T. 68).

Subsequent to the guilty pleas, both men engaged in extensive conversations with government lawyers.[15] On November 22, 1972, DeStefano met with government lawyers and discussed matters totally unrelated to the instant case (Motion T. 288-293, 297-298). On November 24, 1972, both men met with the gov-

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[15] The government lawyers did not make tapes or records of these meetings (Pet. 11-12). Generally, potential witnesses are inhibited by the use of a tape recorder or stenographer, and to require that prosecutors record all discussions with potential witnesses would diminish the effectiveness of an important investigative tool. Because the prosecutors were concerned about possible Sixth Amendment claims by petitioner, Lamattina and DeStefano were warned not to divulge any matters learned at defense sessions (Motion T. 70, Pet. App. A, p. 5a). At the hearing, Lamattina, DeStefano, and the government attorneys who had participated in the meetings were examined by petitioner's counsel, and the court was able to reconstruct what had occurred.

ernment attorneys and were questioned about the facts of the instant case, about petitioner's alleged receipt of the Marcone indictment, the source of petitioner's bribe money, and the Reardon case.[16] The only information learned on that date was that petitioner had taken the Marcone indictment with him on October 8, 1971 (as Detective Leuci had testified at trial two days earlier), and that petitioner had participated in the Reardon case. There was testimony that Lamattina's memory of the Reardon case had to be refreshed by DeStefano (Motion T. 144), and petitioner contends that DeStefano learned about the Reardon case from defense meetings (Pet. 28-29). However, the only defense lawyer who testified to any discussion of the Reardon case with DeStefano was Mr. Krieger (Motion T. 461-462), and DeStefano testified that he never volunteered any information which he might have received from Mr. Krieger and that the government lawyers never asked him to divulge such matters (Motion T. 313). Accordingly, DeStefano must have learned about the Reardon case from Lamattina, which is a wholly reasonable inference in light of their joint corrupt activities in the instant case. Lamattina obviously knew about the Reardon case from his own participation in the matter.

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[16] The Reardon case was a state narcotics case in which the government suspected that petitioner had bribed Lamattina, then a New York City Detective, to fail to appear for a hearing on a defense motion to suppress; the result was that the case was dismissed. At trial, petitioner denied any illegal participation in the Reardon case (T. 1004-1006).

DeStefano did not communicate with any government lawyers between November 24, 1972, and the day of the jury verdict. Lamattina met with one government attorney on November 25, 1972, and spoke only about the events in September and October 1971, when he was a participant in the instant conspiracy (Motion T. 437-438).

There was considerable testimony adduced at the hearing regarding DeStefano's, and to a lesser extent, Lamattina's presence at meetings where defense strategy was discussed (Pet. App. A, p. 5a; Pet. App. B, pp. 30a-32a). There is absolutely no evidence that their participation in defense discussions was accomplished with the connivance or planning of the government. Although there were numerous discussions between DeStefano and petitioner and his attorneys before DeStefano agreed to cooperate with the government, he attended only one such meeting after he agreed to cooperate. That meeting took place on November 27, 1972, but DeStefano did not talk to any government lawyers between that date and the conclusion of the trial. Lamattina only attended one defense meeting, on June 30, 1972, long before he agreed to cooperate with the government.

After the hearing, at which DeStefano, Lamattina, government attorneys who had participated in the prosecution, and several defense lawyers testified, the district court made the following findings:

> There is nothing to suggest that either DeStefano or Lamattina ever told any government lawyer anything about defense strategy or the

> nature of defense preparation. Sagor and Morvillo [government attorneys] both testified that at the outset they [DeStefano and Lamattina] had been prohibited from divulging anything of that kind and there is not one shred of evidence that either failed to comply with that instruction (Pet. App. A, p. 5a).
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> It is true that DeStefano and Lamattina gave the government certain information about the facts of the Rosner case on the meetings of November 22 and 24, after they pleaded guilty. However, none of that information was obtained by them as a result of their participation in defense strategy meetings; it was rather the product of their participation in criminal activities (Pet. App. A, p. 7a).

b. Petitioner's contention that the court erred in denying his motion for a new trial is answered in the opinion of the district court (Pet. App. A, pp. 5a-7a) and in the opinion of the court of appeals (Pet. App. B, pp. 29a-39a), upon which primarily we rely. We note additionally that the cases cited by petitioner (Pet. 17-18) are readily distinguishable from the instant case. *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345; and *Coplon* v. *United States*, 191 F.2d 749 (C.A. D.C.), all involved *illegal* electronic interceptions of conversations between the defendants and their attorneys. No such interception was involved here. In *Caldwell* v. *United States*, 205 F.2d 879 (C.A. D.C.), a government agent went to work for the defense and was admittedly asked to ascertain the names of

defense witnesses. Here, as we have shown, neither DeStefano nor Lamattina could be characterized as government agents. In *United States* v. *Rispo*, 460 F.2d 965, 977 (C.A. 3), the status of an informant, who had participated in the commission of the crime in cooperation with the FBI, was concealed by the prosecution from the court, co-defendants' counsel, and even counsel for the informant-defendant. The court granted a new trial, stating that "the factual tableau presented here is shocking," citing the fact that the informant had actually been indicted, that the court had been permitted to appoint counsel for him, that the prosecution in opening statements and in summation had pointed the finger of guilt at this sham defendant, and that his counsel had attended defense strategy sessions and had discussed these matters with him. Neither DeStefano nor Lamattina were sham defendants.

In sum, the court below was correct in holding that cases of the type cited by petitioner "deal[t] with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa* v. *United States*, 385 U.S. 293, 306 (Pet. App. B, p. 37a). This case is entirely different. As the court of appeals held, neither "Lamattina or DeStefano * * * were ever 'planted' by the Government to discover defense secrets" (*id.* at 36a). In the absence of such "corrupting conduct, * * * [t]here is then no need to punish the prosecutor by freeing the defendant. The matter must then proceed to an ultimate adjudication of

whether the defendant was prejudiced in fact" (*id.* at 37a). Here there is not the slightest hint of prejudice.[11]

3. Petitioner requested to see the internal city-police files on Detective Leuci before the trial, during the trial, and at the hearing on first motion for a new trial. In opposing the pre-trial motion, a legal representative of the New York police department argued that, since police officers "have to go out and arrest people, that many letters and many complaints are sent in against police officers that are unwarranted * * *" (T. 15). Nevertheless, in an exercise of caution, the district judge ordered the files produced and examined them *in camera*. The court found that there was no indication in Leuci's file that he had been disciplined in connection with any complaints (T. 339). At trial, Detective Leuci testified that he had been investigated by the police department but had never been disciplined (T. 376-385),

[11] Petitioner claims that he was unable to conduct an effective defense because he gave the task of investigating Detective Leuci to DeStefano and Lamattina, and that, because of the government's approaches to these men, they did not do a thorough job of investigating Leuci. He states that he would not have given this task to them if he had known of the government's approaches (Pet. 29). However, since both DeStefano and Lamattina considered themselves defendants until just before the trial, there is no reason to suppose that they did not do the investigation of Leuci that petitioner expected. In fact, defense counsel knew of at least two witnesses who told him of alleged acts of misconduct on the part of Leuci prior to trial, but counsel decided not to call one of these witnesses, and the second would not meet with him (transcript of hearing on first motion for a new trial, pp. 4-7).

and that no active investigations were pending against him when he started to assist the government in its investigations (T. 628).

Detective Leuci also candidly testified that on four occasions he had aided and abetted police corruption (T. 163-164). He was subjected to extensive cross-examination on his corrupt activities (T. 344-396). He further testified that in February 1971 he met with Assistant U.S. Attorney Nicholas Scoppetta, who at the time was a member of New York State's Knapp Commission, which was investigating police corruption. Leuci permitted Scoppetta to tape record Leuci's discussions of past corrupt activity as a member of the New York police force; however, Leuci insisted that the tapes remain his personal property and extracted a promise from Scoppetta that they would be returned to Leuci upon request. These tapes were later returned to Leuci as promised, and he destroyed them (T. 342-344).[18]

The procedure adopted by the trial court of inspecting the files on Detective Leuci *in camera* to determine if they would have afforded useful material for cross-examination was proper. See *United States* v. *Deutsch*, 475 F.2d 55 (C.A. 5); *United*

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[18] These are the tapes referred to by petitioner (Pet. 35). Petitioner's allegation that Leuci had a criminal record is untrue; Detective Leuci had never been convicted of any crime. Petitioner's allegation (Pet. 34) that Leuci had been involved in corrupt narcotics activities between 1967 and the time of trial has absolutely no support in the record, despite the fact that a hearing was held on Leuci's alleged criminal activities in response to petitioner's first motion for a new trial.

States v. *Beekman*, 155 F.2d 580 (C.A. 2). Since the files contained no records of discipline and since there were no open investigations, the court was correct in denying the defense request to examine them.

Petitioner's contention that there might have been information in the files that might have provided useful leads to the defense (Pet. 35-36, n. 25) is nothing more than an assertion of a right to engage in a fishing expedition.[19] This Court has consistently refused to permit defense counsel to engage in a "fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up." *Gordon* v. *United States*, 344 U.S. 414, 419; see also *Taglianetti* v. *United States*, 394 U.S. 316.

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[19] Petitioner's reliance on *Giles* v. *Maryland*, 386 U.S. 66 (Pet. 35-36, n. 25), is misplaced. The reports in that case were police reports of interviews with the State's principal witnesses. Statements in the reports were inconsistent with the trial testimony of those witnesses and indicated possible perjury. In this context, Mr. Justice Brennan, in an opinion for three members of the Court, said: "There can be little doubt that the defense might have made effective use of the report at the trial or in obtaining further evidence." 386 U.S. at 74. This statement has no relevance to reports made by third persons about alleged illegal acts which did not lead to discipline. At best, these reports might have led to witnesses who would have testified about alleged prior illegal acts by Detective Leuci. This testimony would have been inadmissible under the rule prohibiting impeachment on collateral matters. See *United States* v. *Kahn*, 472 F. 2d 272, 279-280 (C.A. 2); *United States* v. *Sposato*, 446 F. 2d 779, 780-781 (C.A. 2). Furthermore, the defense purposely chose not to call at least one witness who would have testified to alleged acts of misconduct on the part of Leuci (transcript of hearing on first motion for a new trial, pp. 4-7).

Petitioner's claim that the decision of the district court on this point, affirmed without discussion by the court of appeals, is in conflict with the decision in *United States* v. *Deutsch*, *supra*, 475 F.2d 55, is not well taken. In *Deutsch*, the government refused to produce an internal post office file on a postman-witness. The court remanded the case to the district court "for examination of the personnel file to determine if it would have afforded useful cross-examination. If not, the judgments stand". 475 F.2d at 58. The district court in the instant case made the very determination that the Fifth Circuit in *Deutsch* said would leave the conviction intact. Accordingly, *Deutsch* supports rather than conflicts with the decision here. Similarly, the case of *People* v. *Sumpter*, 75 Misc. 2d 55, 347 N.Y.S. 2d 670 (Sup. Ct., New York County), cited by petitioner (Pet. 15, n. 13), held that the trial judge should examine the police files to determine if there is anything in them appropriate for disclosure to defense counsel.

Petitioner's claim in his supplemental brief that the decision of the district court is in conflict with the decision of this Court in *Davis* v. *Alaska*, No. 72-5794, decided February 27, 1974, is also unfounded. In *Davis*, the defense wished to show that the testimony of the State's principal witness had been biased by the fact that the witness was on probation for a juvenile delinquency adjudication for robbery both at the time of his original identification of the defendant and at trial. The trial court prohibited reference to the juvenile delinquency adjudication,

relying on state statutes making such proceedings confidential. The safe that the defendant was accused of stealing in *Davis* has been found close to the home of the witness, and the defense theory was that the witness had fabricated a story implicating the defendant in order to divert suspicion from himself. When this theory was pursued on cross-examination, the witness denied he had ever been questioned by police officers before as a potential suspect (slip op. at 5). In light of the witness's juvenile adjudication, this denial was improbable, but the defense was precluded from using the adjudication to undermine the witness's credibility. This Court held that, in those circumstances, the constraint on cross-examination violated the Sixth Amendment. In this case, however, the inquiry petitioner may have been aided in making by disclosure of the files was much further removed from the basic issue of guilt or innocence. Petitioner has made no showing that the files contained materials that were actually required for cross-examination, and the *in camera* inspection by the trial judge showed that there was none.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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